SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1903.

NO. 388.

UNION STOCK YARDS COMPANY, OF OMAHA, PLAINTIFF IN ERROR,

v

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY, DEFENDANT IN ERROR.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR

(19039.)

STATEMENT OF CASE.

This case presents the single question whether or not the second amended petition of the plaintiff in error, hereinafter referred to as the plaintiff, states a cause of action against the defendant in error hereinafter referred to as the defendant. The record shows that the plaintiff is a Nebraska corporation and owns and operates the stock yards at South Omaha, Nebraska, which includes the tracks and locomotives necessary to handle cars between the points in its territory and its connections with the lines of the railway companies including the line of the defendant in that city. The

exchange of cars between the plaintiff and the railroad companies is made by means of a transfer track whereon the delivering company leaves its cars and wherefrom the receiving company takes and hauls them away. The plaintiff receives a certain fixed rate per car for its services.

On the 10th of April, 1895, the defendant left a train of cars on the transfer track for the plaintiff to receive and distribute in its territory. In this train was a car which the Hammond Packing Company owned and used with numerous others of similar construction, for distributing its products throughout the United States. Attached to the car was a brake defective in this: the nut which secured the hand wheel to the upper end of the brake staff was too large to hold the wheel in place. When the switching crew in the service of the plaintiff took the train from the transfer track to distribute the cars, one of the crew, a switchman named Edward Goodwin, in the performance of his duty, attempted to set the brake on the Hammond car and in doing this, the wheel slipped off the staff letting him fall to the ground, whereby he received serious injuries. The defendant did not inform the plaintiff of the defective condition of the brake.

Subsequently Goodwin sued the plaintiff for damages on account of his injuries in the district court of Douglas county, Nebraska, and recovered a judgment for $10,350 and costs, which judgment was afterwards affirmed by the state supreme court. On the second day of February, 1899, the plaintiff paid $12,957.58 in full of the judgment, which was thereupon satisfied.

On the 10th of April 1899, the plaintiff instituted the present suit against the defendant in the district court

of the fourth judicial district of Nebraska to recover the amount paid in satisfaction of the judgment, interest and costs. Later the suit was removed to the federal circuit court of that state.

On the 24th of December, 1902, the plaintiff, upon leave of court, filed its second amended petition, to which defendant interposed a general demurrer. This demurrer was sustained and judgment rendered for the defendant.

The case was then carried by the plaintiff to the United States circuit court of appeals for the eighth circuit for review, where it was duly submitted upon briefs and arguments. It is now presented to the United States supreme court for instruction upon the question certified by the circuit court of appeals.

The question reads:

"Is a railroad company which delivers a car in bad order to a terminal company that is under contract to deliver it to its ultimate destination on its premises for a fixed compensation to be paid to it by the railroad company, liable to the terminal company for the damages which the latter has been compelled to pay to one of its employes on account of injuries he sustained, while in the customary discharge of his duty of operating the car, by reason of the defect in it, in a case in which the defect is discoverable upon reasonable inspection?"

In his brief, counsel for plaintiff states the two propositions upon which he bases the plaintiff's claim in these words:

"First proposition: Both plaintiff and defendant were liable to the plaintiff's employe for the injuries he received.

Second proposition: The defendant having been guilty of the original wrongful act from which the damages arose, and but for its breach of a duty it owed plaintiff the injury would not have resulted, the rule that there can be no redress (indemnity or contribution) between joint tort feasors, is not applicable to the facts stated, but the exception to that rule, which is, that where one of several persons answerable for a negligent act or condition which he has not joined in or created has been compelled to respond in damages for such act or condition, he may have redress against the others, is applicable to the facts stated in the question."

Under whatever propositions counsel may present his argument, it is obvious that the plaintiff's right to recover must rest upon the assumption that the negligence imputed to the Burlington company was the primary and proximate cause of Goodwin's injuries.

It may be conceded for the sake of argument that if the defendant with either actual or constructive knowledge of the defective brake, delivered the car to which it was attached, to be received and handled by the plaintiff in the usual course of business and that it, without either actual or constructive knowledge of the defective brake, directed its switchmen to use it in their work, the defendant and not the plaintiff would have been liable to Goodwin for his damages. Under such circumstances, the case would have been within the principle illustrated by the squib-tossing performance so often referred to. The negligence of the defendant would have been the sole, direct and proximate cause of Goodwin's injuries, while the plaintiff would have been the mere innocent instrument through which such negligence produced them.

The case, at bar, however, presents an entirely different state of facts. The plaintiff is seeking to recover from defendant as damages, the amount it has been compelled to pay to satisfy the Goodwin judgment; and the question is, was that judgment as between the parties to the present suit, rendered for damages caused by the negligence imputed to the defendant and not by the negligence of the plaintiff?

The opinion of the supreme court of Nebraska affirming the judgment of the trial court, shows conclusively that the recovery was based solely upon the ground that Goodwin's injuries were the direct and proximate result of the negligence of the plaintiff in directing or permitting its switchmen to receive and handle the car with the defective brake, without proper inspection.

> *Union Stock Yards Company v. Goodwin*, 57 Neb., 138.

It will appear from a casual reading of the Goodwin case that the court held: *First*, that in furnishing servants tools or devices to work with and places to work in, an employer is under a special implied duty or obligation to exercise reasonable care for their safety; *second*, that as a matter of law, the plaintiff is bound to inspect foreign cars for the protection of its employes; and *third*, that under the circumstances a reasonable inspection would have disclosed the defective condition of the brake.

The court say:

"In the district court of Douglas county, Goodwin sued the stock-yards company for damages for his injury; alleged the improper construction of this brake; his ignorance of *its* defect; *that the stock-*

yards company negligently neglected to have this car and brake inspected before taking it into its possession and causing him to use it; that a careful inspection of the brake and car by the inspectors of the stock-yards company would have revealed the defect in the brake; *and that the neglect of the stock-yards company to so cause the brake and car to be inspected was the proximate cause* of his injury. He had a judgment for $10,350, to review which the stock yards company has filed here a petition in error.

With respect to the obligation of the plaintiff to inspect the brake, the court said:

"A person or corporation using the cars or appliances of another person or corporation, *as to its employes,* uses such cars or appliances charged with the same duties as to inspection as if the cars or appliances were its own; and the employe who, under the instructions of his master, uses a car or appliance in his master's possession, belonging to some other person or corporation, thereby assumes only the same risk that he would if the car or appliance belonged to his employer."

The plaintiff, however, contended that in order to recover, Goodwin was bound to show that a reasonably careful inspection would have disclosed the defect in the brake which caused the injury. As to this point the court declared:

"We are persuaded that from the undisputed facts in reference to this defective brake the jury were justified in drawing the inference that a careful inspection of the brake and car would have revealed the defect."

We are, therefore, unable to perceive how the

plaintiff company can maintain its present suit against the defendant to compel the latter to reimburse it for the amount it has been compelled to pay in satisfaction of a judgment in a case in which it has been judicially determined as a part of the judgment, that the damages for which it was rendered, were the direct and proximate result of its own negligence. We respectfully submit that the question as to whether or not Goodwin's injuries were the direct and proximate result of the negligence of the plaintiff, was litigated and determined in the Goodwin case; and that the judgment therein concludes it from asserting in the present action that such injuries were the direct and proximate result of the negligence now imputed to the defendant.

If notwithstanding the judgment aforesaid, it may be shown that the defendant was negligent in leaving the car with the defective brake on the transfer track to be received and used by the plaintiff without advising it of its condition, it is indisputable that the plaintiff was also negligent in receiving and using it without first inspecting it, and but for this lapse it would not have been damaged by the negligence of the defendant.

What, then, is the situation of the plaintiff? Simply this: it asserts that it has been damaged in the sum of twelve thousand dollars because the defendant delivered to it a car with a defective brake, which it negligently accepted and used without exercising any care whatever for its own safety. For the purposes of this case, Goodwin's injuries, his judgment and the satisfaction of it, are only circumstances necessary, perhaps, to show the plaintiff's damages. In other words,

they merely establish the connection between the transfer of the car, and the payment of the twelve thousand dollars *as damages* by the plaintiff.

Had the plaintiff been an individual and personally accepted and used the car without inspecting it, and thereby been injured in the manner that Goodwin was injured, would he be heard to assert as against the defendant that his injuries were the result of its negligence, or would it be held that such injuries were the result of his own contributory negligence?

Now, it seems to us that the plaintiff is in no different situation. It was bound to exercise reasonable care to protect itself from danger incident to the use of a defective brake, even though it had been negligently delivered to it by a connecting carrier, and if, in failing to exercise such care an injury had resulted to it, no matter if indirectly, such injury would be the result of its own negligence and not the negligence of the connecting carrier.

Surely it cannot be said that the plaintiff has a cause of action against the defendant for its alleged *damages* simply because Goodwin had a judgment for his *injuries* against the plaintiff; for the injuries were the natural and legal result of the failure of the plaintiff to perform its duty to Goodwin arising out of the relation as master and servant. That is to say, the plaintiff in the exercise of its authority as master, pushed him into a dangerous place of which *it had at least constructive notice*, without any regard whatever for his safety, and because of this culpable act and the consequent injuries the judgment was rendered in his favor.

It follows that if the plaintiff herein can maintain

his suit against the defendant for the *damages aforesaid*, it must be upon the theory that as between the parties themselves the damages were caused solely by the negligent act. of the defendant. It is, however, conceded, that but for the *subsequent* negligent act of the plaintiff, Goodwin would not have been injured and the plaintiff would not have been damaged.

We submit that if the case could be considered upon this theory, then the facts stated in the plaintiff's petition bring it within the general rule that "if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured, an action for the injury cannot be maintained unless it further appear that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence."

Grand Trunk Ry. Co. v. Ives, 144 U. S., 408, 429.

It has also been urged that because the defendant delivered to the plaintiff the car with the defective brake, the law thereby imposed upon the defendant an obligation to *indemnify* the plaintiff for his damages resulting from the use of the brake, and, inasmuch, as the plaintiff has been compelled to pay its servant for his injuries resulting from such use, the defendant is bound to respond. This theory is also untenable. It would be to require the defendant to indemnify the plaintiff against loss on account of its own negligence, for whether the act of the plaintiff in requiring its servant, Goodwin, to use a defective appliance, without exercising any care for his safety, be considered a contributing cause or a contributing condition, the

plaintiff was bound under the obligations stated, to exercise proper care to prevent the *act itself*.

If, under the relations and arrangements existing between them for the transfer of cars, the defendant was bound to see that the car was fit for use before *delivering* it, then the plaintiff was bound to see that it was fit for use before *using* it. These duties were not *to be performed jointly, but independently and successively*. If the plaintiff had a right to rely upon the promise of the defendant to inspect the car before *delivering* it, the defendant had a right to rely upon the promise of the plaintiff to inspect the car before *using* it. Indeed, if we assume that the necessity for an inspection of the car existed with reference to its *use* only, and that the plaintiff, and not the defendant, was to use it, the plaintiff's obligation was the important and controlling circumstance in the situation. An inspection by the defendant at that time would not have relieved the plaintiff of its duty either to its servants or to the public. Had the defendant made an inspection of the car and reported it to the plaintiff in good condition when it was in bad condition, and had the plaintiff adopted the inspection, and *relying upon it*, directed or permitted its servants to use it in the course of their employment, the law might have supplied an obligation upon the part of the defendant *to indemnify the plaintiff* against any damages resulting from such use. This obligation, however, would not have relieved the plaintiff of its duty to exercise reasonable care for the safety of its servants who, in the course of their employment, might handle the car.

It should also be remembered that if—as it is asserted—the defendant owed any duty, under the cir-

cumstances, to the plaintiff's servants, then, it was directly concerned in the inspection to be made by the plaintiff; because by such an inspection the plaintiff might discover and remove any defective condition overlooked, whether negligently or otherwise, by the defendant's servants,

We submit that, the plaintiff having confessed its delinquency to its servants and ignored its obligation to the defendant, it is not in a position to claim anything of the latter by way of indemnity.

The suggestions contained in the preceding paragraphs may, perhaps, be more appropriately considered in connection with the questions embraced in the two propositions stated in the brief of counsel for the plaintiff. If, for the moment, and for the sake of argument, the correctness of his first proposition be conceded, namely, that both the plaintiff and defendant were liable *to Goodwin* for his injuries, we submit that he does not thereby establish the plaintiff's case. Indeed, his argument under the second proposition is directed to this end. The second proposition, however, covers the entire case. It will, therefore, be more convenient for the writer to discuss the defendant's liability without special reference to counsel's arrangement.

Briefly, the contention in plaintiff's behalf is that, while the negligence of the two companies concurred in producing Goodwin's injuries, they were not in *pari delicto*, and, therefore, the case should be distinguished from cases where the parties are in *pari delicto*. The distinction between the two classes of cases is clearly stated by the supreme court of Massachusetts in these words:

"Our law, however does not in every case disallow an

action by one wrongdoer against another, to recover damages incurred in consequence of their joint offense. The rule is, *in pari delicto potior est conditio defendentis*. If the parties are not equally criminal, the principal delinquent may be held responsible to his codelinquent for damages incurred by their joint offense. In respect to offenses, in which is involved any moral delinquency or turpitude, all parties are deemed equally guilty, and courts will not inquire into their relative guilt. But where the offense is merely *malum prohibitum*, and is in no respect immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them, although both parties are wrongdoers." *Lowell v. Boston & L. R. R. Cor.* 23 Pic. 24.

Our contention is:

First—That the defendant owed no duty whatever to the plaintiff's servants to protect them from dangers incident to the occupation and use of the premises and appliances furnished them by the plaintiff, to be occupied and used in the prosecution of their work. And, therefore, could be guilty of no negligence to them.

Second—That even if the plaintiff owed the duty aforesaid, its failure to perform it would not, under the circumstances of this case, make the defendant the first and principal wrongdoer.

The principle, *sic utere tuo, ut alienum non lædas*, is of universal application. Corporations the same as individuals are bound to conduct their business with reasonable concern for the safety of whoever or whatever may be exposed, if the same be not properly conducted. One may not walk or drive along a public street, nor run a car over a line of railroad without

due care. It is, therefore, inevitable that whatever one may be doing or using, the obligation to exercise proper care imposes the necessity—the absolute necessity—to use his faculties as circumstances may require. Thus, he may be required to look, to listen, to feel. In other words, to examine, investigate or inspect. The *obligation* is one he cannot rid himself of, and the *necessity* is one he ought not to ignore; and though he ignore the *necessity*, he cannot shirk the *obligation* nor escape the consequence of a failure to perform it.

The perils incident to railway transportation are a matter of common knowledge. Freight cars with brakes attached are of general use upon all lines. They pass freely and continuously from one section of the country to another; they are carried at high rates of speed, and are subject to all the violence incident to the handling of freight trains; they are exposed to all changes of climates, and to the vicissitudes of the weather. It is inevitable that they shall occasionally become damaged, especially the brake appliances attached to them. The consequence is that every company which handles one of these cars (whoever may be the owner of it), becomes in a measure responsible for its condition and use while it is in its possession, or, under its control. It may neither transport the car nor direct its servants to handle it, without knowing exactly its condition, if the proper exercise of the corporate faculties will disclose it. Not that the failure to properly exercise the corporate facuties—for instance to properly inspect—of itself constitutes an *act of negligence*, but rather that the *use of the car unfit for use*, under such circumstances would constitute an act of negligence.

A want of knowledge of the defective condition of a car *through a failure to properly inspect it*, would furnish no excuse for an omission to guard against the dangers incident to its use. If the defect were one not open to proper inspection the company would not be required to anticipate the dangers incident to its use, for the reasonableness of one's conduct depends upon the natural and probable consequences of it; but one is not bound, in the absence of the necessary information or knowledge, to foresee that certain consequences are reasonable and probable. It is in this way that knowledge of existing conditions is the vital element in all questions of negligence. In a juridical sense, one not only knows what he knows, but also what he should know, through the ordinary means of knowledge afforded by the situation. It is in this sense that actual knowledge and constructive knowledge are identified, so far as legal consequences are concerned. Where the defective condition of a car is discovered by an inspection, the condition is brought to the actual knowledge of the company, and where the defective condition may be known by proper inspection, but no inspection is made, nevertheless, the company has *constructive* knowledge thereof. In a legal sense, then, the company that uses a car *unfit for use* without actual knowledge of its condition is, nevertheless, charged with the duty of guarding against the dangers incident to its use, because of its constructive knowledge. In either case the *negligent use* of the car is the sole and proximate cause of the resulting injury. We reiterate that it is *the act of using a defective car, either with or without knowledge of its defective condition, that constitutes actionable negligence, if such defective condition may be known by a proper inspection.*

The practical result of the rule which requires railway companies, by reason of the perils incident to their business, to inspect all cars before receiving, handling or using them upon their lines is: that every company is bound to know the actual condition of each car it receives, hauls and uses, and the appliances attached to it, whether it does or does not inspect it, and without regard to its ownership or its source and destination.

It cannot be doubted that it was the duty of the plaintiff, before accepting the car in question, or directing its servants to handle it, to discover the defect in the brake, if the defect were open to reasonable inspection.

Railroad Company v. Mackey, 157 U. S., 72;

Railroad Company v. Smock, 23 Colo., 456;

Railroad Company v. Penfold, 57 Kan., 148;

Railroad Company v. Williams, 95 Ky., 199;

Railroad Company v. Reagan, 96 Tenn., 128;

Railroad Company v. Merrill, (Kan.), 70 Pac., 358, 362:

A railroad company using cars and appliances of other companies is charged, as to its employes, with the same duty to inspect as if the cars were its own.

Stock Yards Company v. Goodwin, 57 Neb., 138, 77 N. W., 357;

Eddy v. Prentice, 8 Tex. Civ. App. 58, 27 S. W., 1063;

Jones v. Shaw, 16 Tex. Civ. App., 290, 41 S. W. 690;

Felton v. Bullard, 94 Fed., 781;

New Orleans & N. E. R. Co. v. Clements, 100 Fed., 415.

A railway company which undertakes to haul foreign cars and has an opportunity to inspect them, is negligent if it fails to discover and repair dangerous defects in the coupling apparatus, brakes or any of the other appliances, where such defects are open to a reasonable inspection.

Mackey v. Railroad Company, 19 D. C., 282;
Railroad Company v. Williams, 95 Ky., 199;
Mateer v. Railroad Company, 15 S. W., 970;
Bender v. Railroad Company, 177 Mo., 240, 37 S. W., 132;
Jones v. Railroad Company, 20 R. I. 210, 37 Atl. 1033.

The general duty which rests upon a railroad company to exercise reasonable care in the inspection of cars to be handled by its employes, is not restricted in the case of foreign cars, to such as are to be sent out over its own roads, but governs as to all such cars which its employes are handling, though only in its switch yards, and for the purpose of being loaded and returned to another road.

Railway Company v. Archibald, 170 U. S., 665;
Railroad Company v. Penfold, 57 Kan. 148. 45 Pac., 574.

These cases and the reasons, which support them make it clear that when the plaintiff received the car and directed or permitted its servants to handle it and to use the brake attached to it, its duty to guard them against the risk incident to the use of the brake—the defect not being a ~~recent~~ secret one—was as imperative *as if it had actual knowledge of its condition.*

It is the law and common sense of things that one

should exercise care to protect the community from dangers which are merely incident to the use of a thing which he is using. It is also the law and the common sense of things that one should not be required to exercise care to protect the community from dangers which are merely incident to the use of the thing which he is not using.

The courts make a distinction between things which are dangerous of themselves—as an excavation in a public street, or a wall stricken with decay—and things which are dangerous only from their improper use—as a defective tool or appliance. One who makes an excavation in a public street *may* be responsible, even though he has no control either of the excavation or of the street; but one who simply delivers to another a tool or an appliance to be used by the other in the conduct of his business, cannot be held responsible for injuries which result from the *improper* use of it, and it makes no difference whether the *improper* use consists in the manner in which it is used or in the use of it at all.

We insist that in delivering the car in question to the plaintiff, the defendant owed no duty whatever to the plaintiff's servants to protect them from risks involved in handling the car, or the brake attached to it. Whatever duty the law imposed upon the defendant for the safety of the community and of its employes, while the car was under its control, its responsibility ceased the moment it passed into the possession of the plaintiff and beyond the point at which it should have been inspected.

William Glynn v. Central Railroad, 175 Mass., 510.

The case here cited was one for personal injuries.

Glynn was an employe of the N. Y., N. H. & H. R. R. at Stonington, Conn., and was engaged in coupling a train to a car belonging to the Central R. R. Company, when his sleeve was caught by a bolt projecting from the deadwood of the car and his hand was crushed. It was assumed that the car was in such condition that the defendant would have been liable had the car been in its possession and the plaintiff in its employ. It was also assumed that the car had come from the possession of the defendant recently, and in the same condition as that in which it was at the time of the accident. The opinion in the case was delivered by Mr. Chief Justice HOLMES, who said:

"There was no dispute that after the car had come into the hands of the New York, New Haven, and Hartford Railroad, and before it had reached the place of accident, it had passed a point at which the cars were inspected. After that point, if not before, we are of the opinion that the defendant's responsibility for the defect in the car was at an end. * * * Thus the case of *Clifford v. Atlantic Cotton Mills*, just cited, (146 Mass., 47, 48), shows that the mere ownership of a house so constructed that its roof would throw snow into the street, and therefore threatening danger as it is without more, whenever snow shall fall, is not enough to impose liability when the control of it has been given up to a lessee who, if he does his duty, will keep it safe. In the case at bar the car did not threaten harm to anyone, unless it was used in a particular way. Whether it should be used in a dangerous way or not depended not upon the defendant, but upon another road. Even assuming that the car had come straight from the defendant at Harlem River, the defendant did no

unlawful act in handing it over. Whatever may be said as to the responsibility for a car dispatched over a connecting road before there has been a reasonable chance to inspect it, after the connecting road has had the chance to inspect the car and has full control over it, the owner's responsibility for a defect which is not secret ceases."

In *M. K. & T. R. R. Co. v. Merrill*, 70 Pac. 358, the supreme court of Kansas, reversing its previous decision in the same case,—see *Railway Company v. Merrill*, 61 Kan., 671, 60 Pac., 819,—held that:

"A railway company which delivers a defective freight car to a connecting line is not liable in damage to an employe of the latter, who is injured by reason of such defect, after the car has been inspected by the company receiving it. The loss of control over the car and over the servants having it in charge relieves the delivering company from responsibility to the employes of the receiving company."

See *Sawyer v. Railway Company*, 38 Minn., 103;

Wright v. Canal Co., 40 Hun, 343;

Mackin v. Railroad Company, 135 Mass., 201;

Winterbottom v. Wright, 10 Mees. & W., 109-114;

Clifford v. Atlantic Cotton Mills, 146 Mass., 47, 48;

Heizer v. Manufacturing Co., 110 Mo., 605.

The plaintiff, however, insists that the car having passed over the lines of defendant, its responsibility did not cease even after the car had passed the point for plaintiff's inspection. This contention can find support in no principle less broad than that where a

car passes over the lines of a railway company and is delivered to another railway company in a defective condition which is open to inspection, the delivering company thereby becomes responsible for all injuries which may thereafter result from the use of the car in its defective condition by whomsoever and whereso-ever used, simply because the delivering company failed to discover and repair the defect in the car while in its possession. Also that the delivering company is not directly liable to the persons injured, without fault on their part, but it is liable to every railway company, which by reason of its own negligence, is made to respond for damages for such injuries.

The application of this rule would be impracticable if not impossible. It would unquestionably promote endless controversy and litigation between railway companies, with the certainty that in many, if not in most instances, the real and immediate delinquent would practically escape without pecuniary loss.

The correctness of the plaintiff's proposition is submitted by its counsel upon the authority of *Moon v. Northern Pacific R. R. Co; Penn. Ry. Co. v. Snyder; Heaven v. Pender; Elliott v. Hall, Hoye v. G. N. Ry. Co.*, and *Texas v. American Mining Co.*

In delivering its final judgment in the Merrill case, (70 Pac. 358.) the supreme court of Kansas pointed out wherein these cases differ from cases like the one under consideration. We quote the following from its opinion:

> "In *Railway Company v. Snyder*, 55 Ohio St. 342, there was a traffic arrangement between the different railway companies forming a fast freight line by which they were to share in the earnings of

the transportation in proportion to the distance the car should be hauled over their respective roads. Under the arrangement the Pennsylvania Company, before delivering its cars to the Lake Shore Company, agreed to have them properly inspected and put in safe condition for hauling. The car, when delivered to the Lake Shore Company to be taken over its road was defective and unsafe, which proper inspection would have discovered, and injury caused thereby to an employe of the Lake Shore Company. The case differs from the present one. It was argued in the briefs in that case that by reason of the traffic contracts between them, the two railroads were partners, and it is stated in the opinion that, under the arrangement, the Pennsylvania Company, before delivering its cars to the Lake Shore road, was to have them properly inspected and put in safe condition for hauling. While there is much said in the opinion favorable to the defendant in error on the question before us, yet the peculiar contractual relations of the two roads as to inspection and payment of the cost of repairs do not exist in this case. In the case just commented on *Moon v. Railway Company*, 46 Minn., 106, * * * is cited and approved. That decision was given prominence as a precedent in the former opinion in this case: in the Moon case the Northern Pacific and Manitoba Companies were connecting carriers and interchanged cars at certain common points under a traffic agreement. According to a rule adopted by the companies cars received and delivered, were required to be inspected by the car inspectors of both on the transfer track, and, if any repairs were needed, they were to be made by the Northern Pacific Company before they

were transferred and received by the Manitoba Company. Accordingly the car was so inspected by the car inspectors of both companies. It was examined by them together at the same time, and they agreed that it was in good order. Afterwards while the car was being operated by the Manitoba Company, the plaintiff's intestate was injured by a defective brake. It was claimed that the brake staff was defective and also that the car was not properly or carefully inspected by the inspectors of the respective companies. It is to be observed that in the Moon case, the inspection by the two companies was substantially one act. The Northern Pacific company, through its inspector, at the time the inspection was made, knew that no other or further inspection would be made for the protection of the employes of the Manitoba Company, hence he is held in law to have anticipated that if his inspection was careless or negligent, the employes of the Manitoba Company would be subjected to whatever dangers should arise therefrom * * *"

We do not doubt that railway companies, operating connecting lines, may make traffic agreements for the exchange of cars, which shall require the delivering companies to inspect and repair them before delivery. Agreements of this kind, construed as mere regulations to facilitate the interchange of traffic, are reasonable and perhaps necessary arrangements. They not only place the burden of the repairs upon the delivering companies, where it belongs, but they also promote order and system in the handling of cars.

Such agreements, however, do not relieve the receiving companies of their obligations either to their employes or to the public. Nor are they *designed* to

impose upon delivering companies any duty or obligation in respect to those who may be injured by handling or using the cars while under the control of the receiving companies which the law would not in the absence of such agreements, impose upon them.

In the *Snyder* case, 35 Ohio St. 342, 45 N. E. 559, the supreme court of Ohio, after emphasizing the traffic arrangements between the Pennsylvania and the Lake Shore companies, which required the former to properly inspect its cars and put them in safe condition for hauling, before delivering them to the latter, and also required the latter to properly inspect them and put them in proper condition before receiving them, proceeds to say:

> "It is further claimed that the plaintiff in error was under no obligation or duty to the employes of the Lake Shore Company to exercise care in the inspection of cars furnished the latter company, or in making repairs necessary to have them in proper condition; and, as both companies were mutually in fault with respect to the car in question, so that neither could be made liable to the other, the plaintiff below was without remedy against the Pennsylvania Company, because his injury was received while acting exclusively under the employment of the Lake Shore Company; the servant being bound, it is argued, by the act of the master. We think this position is not tenable. It was not necessary to the liability of the plaintiff in error that a contractual relation should exist between it and the plaintiff below, nor that the injury should be one resulting from the violation of a duty it owed the general public. Whenever a person should reasonably apprehend that, as the natural and probable consequence of his act or neg-

> lect, another will be placed in a situation of danger of receiving an injury, a duty of exercising due care arises, and if the injury results from the failure to use such care, a liability to the person injured will generally exist in the absence of any other controlling fact. * * * * * * The test is to be found in the probable injurious consequences to be anticipated, and not in the number of subsequent events and agencies that may arise."

The court further observes that the traffic arrangement *contemplates* that the cars furnished by the Pennsylvania company would be handled by the employes of the Lake Shore company, and that a reasonably prudent person would anticipate that such employes would be exposed to the dangers of receiving injuries in handling a defective car, or one with defective appliances, furnished under the arrangement, and, therefore, that the Pennsylvania company owed a duty to the servants of the Lake Shore company to use reasonable care in making the inspection and furnishing the repairs before delivering the cars to the Lake Shore company to be placed by that company in charge of its employes.

In this connection, the court also refers to the Moon case, *supra*, as a case quite like the one before it, and approves the decision therein as one well considered and quite in harmony with its own views.

We do not perceive the force of the suggestion of the court in the Snyder case that the argument in favor of the Pennsylvania company was not tenable because it was not necessary to the liability of the Pennsylvania company that a contractual relation should exist between it and the servants of the Lake Shore

company; nor, that the injury should be one resulting ftom the violation of a duty the Pennsylvania company owed the general public. If there were no contractual relations between them, then, the duty which the Pennsylvania company owed the servants of the Lake Shore company must have been a general one. Indeed, the liability of the Pennsylvania company was distinctly put upon the ground that it ought to have foreseen that the servants of the Lake Shore company would be required to handle the car and use the appliances attached to it, and that in case the car or the appliances were defective the servants would be exposed to the dangers incident to their use, unless it discovered and repaired them before delivering the car to the Lake Shore company. This is a mere statement of a general duty. For, if the Pennsylvania company was bound to anticipate injuries to the employes of the Lake Shore company, it was also bound to anticipate injuries to the employes of any other company which might haul the car in the course of its journey. It was also bound to anticipate damages to property. In a word, it was bound to anticipate all the mischief that a defective car may occasion to life and property while being operated by any of the railway companies participating in the haul.

Neither can we perceive how the traffic arrangements referred to by the Ohio and Minnesota courts made it any more clear to the delivering companies that the cars in question would be handled by the employes of the receiving companies. It has been suggested that, under these traffic agreements, it is *contemplated by the parties to them*, that the delivering company shall fit the cars for the use of the employes of the receiving company, then why provide for in-

spection by the receiving company, as was done in the traffic agreements in both the Snyder and Moon cases?

Can it be said to be fairly within *the contemplation of the parties to a traffic agreement* that cars transferred between them shall be used by the employes of the receiving company in *the very condition* in which they are delivered, when both the law and the contract impose upon the receiving company the absolute duty to inspect and repair, which is equivalent to requiring that the receiving company shall actually know what condition the car is in? We insist that the inspection of the delivering company would not be final; that it would not supersede an inspection by the receiving company, nor would it be accepted and relied upon by the receiving company as an assurance that the car was in fit condition for use. A railway company is not bound to accept cars from a connecting line, which are unfit for use, but such cars are, in the rush of business, frequently delivered and accepted with the consequent risk to the receiving company and its employes. It is, therefore, not only a matter of duty but of economic necessity that the receiving company shall properly inspect the cars, and if found defective, require the delivering company to repair them. At least, it can refuse to receive them until they are repaired. On the other hand, after the cars have passed from its control, a delivering company may no longer be concerned for the safety of those who are exposed to the dangers incident to their use, if they are in a defective condition. Still, it is directly and immediately concerned in having the receiving company accept them when tendered in the usual course of business and, as far as possible, to free the companies and their servants from all the delay, confusion and perils incident to the transfer of the cars.

In this way, and for this reason, the customery inspection by delivering companies has become generally adopted as a *business* necessity. The requirement therefor, even in a traffic agreement, that the cars shall be inspected and repaired by the delivering company before delivery, affords no reasonable ground for holding that it thereby intends to become responsible for the condition and use of the cars in the hands of the receiving company, or, even to relieve the receiving company of the duty which the law imposes upon it, to know the actual condition of the cars before using them where such condition may be known by a proper inspection.

Inspection by delivering companies is purely a matter of business, convenience or necessity. The interchange of traffic between connecting lines could hardly be carried on if the inspection of cars were left entirely to the receiving company. The great traffic centers of the country, where these interchanges are largely made, are literally crowded with cars to be transferred. Trains comprising a score or more of cars are placed upon transfer tracks for the receiving companies. The facilities for handling them are limited. Time is valuable, and some order and method must be observed. What, under these circumstances, would be the state of these yards were the inspection of cars left entirely to the receiving companies? This would daily and hourly impose upon the receiving companies the alternative of either repairing damaged cars, or rejecting them, and would involve not only great expense, but also interminable labor and confusion. A damaged car in a train, if not repaired, must be set out, and if there were several to set out, the process would be attended with more or less labor and confusion. All of this is practically eliminated through inspection by the delivering

companies. These circumstances supply the *immediate* motive and object for inspection by delivering companies. The law does not impose it as a duty,—it is an obligation voluntarily assumed by the companies to each other as a *business necessity*. Hence, a stipulation in a traffic agreement, requiring the delivering company to inspect and repair before delivery, is made with reference to business conditions and it is a forced interpretation of the agreement to say that the parties had in contemplation the safety of those who should be exposed to the dangers incident to the use of the car after the receiving company had accepted it, and while it had control of it. Indeed, traffic agreements invariably contain a stipulation requiring the receiving company to inspect. That is to say, the parties contemplate, that before the receiving company shall accept and use a car it shall know its actual condition, so far as it may be known by a proper inspection, so that it may determine for itself whether or not the car and the appliances attached to it are fit for use, or whether or not it shall accept it.

Between the present act of the delivering company, and the remote injury to a servant of the receiving company, the law has placed upon guard an independent force, and has charged it with knowledge of such defective conditions which may be known by reasonable inspection. *To charge this independent force with knowledge is to make it a responsible force.* The acceptance and use of a damaged car by a receiving company is purely a voluntary matter. Thus, the transfer of a car by one company to another is merely to hand the car over to an *independent, responsible force*, charged with knowledge of the actual condition of the car, so far as it may be known by proper inspection. It is independ-

ent because it may not only accept or reject a car unfit for use, but while it is in its possession, it has the sole and exclusive control of it and of the employes who are to handle it. It is responsible, because it is bound to know the actual condition the car is in; also because it is under the moral and legal compulsion of an absolute duty toward every person and thing which may be exposed by the improper use of the car while subject to its control. For these reasons an injury to its servants is too remote from the act of the delivering company to be considered *within the contemplation of the parties* to the transfer at the time the transfer is made.

Nevertheless, the liability of delivering companies, under these traffic agreements, has been exploited by some of the courts upon the theory that the stipulations respecting repairs created duties and obligations that would otherwise have no existence. In their opinions, the courts have *assumed* that in delivering cars, pursuant to the stipulations, the delivering companies, in a legal sense, furnished the cars *directly to the employes of the receiving companies for their immediate use*, and, therefore, were bound to exercise proper care for the protection and safety of such employes. Aside from the consideration that the doctrine announced in these cases can have no application to the case at bar, for the reason that the parties were not operating under any traffic agreement of the kind referred to, we insist that the doctrine itself is indefensible and that the decisions in which it is announced are not based on sound reasoning, nor a proper application of well established principles.

The responsibility of the delivering companies to the employes of the receiving companies to which they deliver unsafe cars was first considered and adjudged

by the supreme court of the state of Minnesota in the Moon case, *supra*. In its opinion, the court stated the general principle that:

"If a reasonable man must see that, if he did not use due care in the circumstances, he might cause injury to the persons or property of another entitled to repose confidence in his diligence, a duty arises to use such care. (Smith Neg., 12 and notes, *Heaven v. Pender*, 11 Q. B. Div. 50.) * * * We do not inquire as to the application of the rule here considered to intermediate carriers The delivery of cars to the servants of the Manitoba company was an affirmation that the car was fit for use, and the latter were entitled to repose confidence in the implied assurance that such was the fact."

Heaven v. Pender, 11 Q. B., 510, cited in plaintiff's brief, has frequently been referred to by courts to support the views of the Ohio and Minnesota courts with respect to what may be considered fairly *within the contemplation of the parties* to these traffic arrangements or understandings. In that case, the defendant, a dock-owner, supplied and put up a staging outside the ship, in his dock, under contract with the ship owner. The plaintiff was an employe of a ship painter, who had contracted with the shipowner to paint the outside of the ship, and, in order to do the painting the plaintiff went on and used the staging, when one of the ropes by which it was slung, being unfit for use when supplied by the defendant, broke, and by reason thereof the plaintiff fell into the dock and was injured.

It was held, reversing the decision of the Queen's Bench Division that the plaintiff, being engaged in work on the ship in the performance of which the de-

fendant, as dock owner, was interested, the defendant was under obligation to him to take reasonable care that at the time he supplied the staging and ropes they were in a fit state to be used, and that for the neglect of such duty the defendant was liable to the plaintiff for the injury he had sustained.

In delivering his judgment, BRETT, M. R., stated the rule to be:

"That whenever one person supplies goods, or machinery, or the like, for the purpose of their being used by another person under such circumstances that every one of ordinary sense would, if he thought, recognize at once that *unless he used ordinary care and skill with respect to the condition of the thing supplied, or the mode of supplying it*, there would be danger of injury to the person or property of him for whose use the thing is supplied, and who is to use it, a duty arises at once to use ordinary care and skill as to the condition or manner of supplying such things; and for a neglect of such ordinary care or skill whereby injury happens, a legal liability arises to be enforced by an action of negligence This includes the cases of goods, etc., supplied *to be used immediately by a particular person or persons or one of a class of persons*, where it would be obvious to the person supplying, if he thought, *that the goods would in all probability be used at once by such persons before a reasonable opportunity for discovering any defect which might exist*, and where the thing supplied would be of such a nature that a neglect of ordinary care or skill as to the condition or manner of supplying it would probably cause danger to the person or property of the person for whose use it was supplied and who was about to use it. It would exclude a case in which the goods are sudplied

under the circumstances in which it would be a chance by whom they would be used or whether they would be used or not, or whether they would be used before there would probably be means of observing any defect, or where the goods would be of such a nature that a want of care or skill as to their condition or the manner of supplying them would not probably produce danger of injury to person or property. * * * * *"

Herein the court fixed the duty of the defendant with reference to the circumstances under which the staging was used. These circumstances were that the staging was to be *immediately used by the servants of the ship painter;* the staging was furnished by the dock owner for that purpose; there was to *to be no inspection* by the ship owner or the ship painter, so that it was contemplated by all the parties interested that the dock owner was supplying the staging to the painters for their *immediate* use, and, therefore, was responsible to them for its safe condition.

In Beven on Negligence (2d ed. vol. 1, p. 62) the author says:

"It is submitted that that the principle underlying the decision in *Heaven v. Pender* is that the dock owner, having undertaken to supply the staging, there upon undertook the obligation to supply fit staging, which obligation the plaintiff was justified in assuming he would discharge. *Had there been a duty on the ship owner or ship painter to examine the staging, the chain of connection between the plaintiff and the dock owner would have been broken.* The decision must, therefore, be taken to imply that there was no duty on the part of anyone subsequent to the dock owner to test the staging supplied, but that, when the dock owner undertook to

supply the staging, there was an obligation that the staging supplied should be reasonably fit for the purpose for which it was to be used; so that those coming to use it might trust to the performance of the dock owner's duty without any independent examination of their own."

In *Elliott v. Hall* the defendant, a colliery owner, consigned coal sold by him to the buyers by rail, in a truck rented by him from a wagon company for the purposes of the colliery. Through the negligence of the defendant's servants, the truck was allowed to leave the colliery in a defective state. In consequence of the defect in the truck, injury was occasioned to the plaintiff, one of the buyer's servants, who was employed in unloading the coal, and who had gotten into the truck for that purpose. In his decision Judge GROVE remarked:

"It is clearly part of the contract for the sale of the coal to the plaintiff's employers that it should be conveyed in a truck to the buyers, and it must necessarily have been contemplated that, when it arrived at its destination, the truck would be unloaded by the buyer's servants. I think it is plain that under these circumstances a duty arose on the part of the defendant towards the plaintiff. If vendors of goods forward them to the purchasers, and for that purpose supply a truck or other means of conveyance for the carriage of the goods and the goods are necessarily to be unloaded from such means of conveyance by the purchaser's servants, it seems to me perfectly clear that there is a duty on the part of the vendors towards those persons who necessarily will have to unload or otherwise deal with the goods to see that the truck or other means of conveyance is in good condition

and repair so as not to be dangerous to such persons. I do not say that the vendors would be responsible for latent defects, or matters that they could not reasonably foresee, but they are, in my opinion, bound to see that the machinery of the truck is apparently in good order. It is contended that there is no duty because there was no contract with the plaintiff, but the plaintiff was acting as the servant of the company with whom the contract was made, and the defendant must have known that the buyers would not unload the coal themselves and that their servants would do so. Under these circumstances it seems to me clear that there was a duty not to be guilty of negligence with regard to the state and condition of the truck."

Judge SMITH in his opinion in the same case, remarked that:

"The defendant had entered into a contract for the supply of coal to the plaintiff's employers, and sent the truck loaded with coal for the purpose of being unloaded by the buyer or his servants. Those being the respective position of the plaintiff and defendant, I cannot see how it can be said that there was no duty owing from the defendant to the plaintiff to see that the truck, *which the plaintiff was to unload*, was in a safe state."

The opinions in the *Heaven* and *Elliott* cases make it quite clear that the judges merely applied to the facts before them, the general principle, that one must anticipate the reasonable and probable consequences of his conduct. They held that the staging in the one case, and the truck in the other case were, under the circumstances, *supplied for the immediate use of the persons injured, because the defendants knew that, in all*

probability, they would be used before a reasonable opportunity for inspection would be afforded.

It can hardly be claimed that, in transferring cars under traffic agreements, which expressly require the receiving company to inspect before accepting them, the delivering company is chargeable with *notice that, in all probability, the cars will be used by the employes of the receiving company before an opportunity to inspect them has been given.* Neither can it be seriously contended that where cars are transferred in the absence of traffic agreements the delivering company is chargeable with such notice, because the law imposes upon the receiving company the absolute duty and obligation to see that they are fit for use before using them.

The case of *Hoye v. G. N. Ry. Co.*, and the case of *Teal v. American Mining Co.*, are cited to sustain the liability of delivering companies in cases similar to the one at bar.

The Hoye case was an action by a citizen of Montana against a local and a foreign railway corporation for injuries alleged to have been caused by the concurring negligence of the two corporations. The suit was brought in the state court and thence removed to the federal court, on the grounds of diverse citizenship and that the case presented a separable controversy. The federal court held that upon the face of the pleadings the case did not present a separable controversy and thereupon remanded it to the state court.

In the Teal case the averments of the petition were admitted to be true by the demurrer. One of the allegations was that "the railway company furnished the cars to the mining company for its *and its employes'* use

in transporting its ore;" and in deciding the court remarked that:

"If the allegation of the complaint be true, the railway company knowing the car to be in an unsafe condition and knowing it was to be used by the employes of the mining company transferred it to the lines of the latter for such use, *except for this* negligent act the plaintiff would not have been injured."

The court distinctly declared that the question had been put to rest by its decision in the Moon case, and sustained the order of the trial court overruling the demurrer.

The decisions in the Hoye and Teal cases add nothing whatever to the weight of the authority of the Snyder and Moon cases; and, in all the cases cited by plaintiff's counsel under his first point the courts have merely attempted to apply the principle announced in the Heaven and Hall cases to transactions between railway companies, under express traffic agreements for the transfer of cars. In doing this, they have assumed that, under the circumstances, the delivering companies designed and contemplated that the cars transferred by them should be turned over to the employes of the receiving companies for immediate use and without inspection; whereas, both by established usage and express stipulations, it is universally recognized and known that receiving companies are required to inspect all cars before accepting them or using them and are solely responsible for their condition while under their control, as well as the safety of their employes, charged with the duty of handling them.

Under his second proposition counsel for plaintiff insists that the rule:

"Where one of several persons, answerable for a negligent act or condition which he has not joined in or created, has been compelled to respond in damages for such acts or conditions, he may have redress against the others,"

is applicable to the facts in the present case.

It may not be unimportant to note that the defendant had *no actual knowledge* of the defective condition of the car or the brake in question. It simply failed to discover and repair what plaintiff itself subsequently failed to discover and repair before directing or permitting its employes to handle the car.

We insist that the negligence of the defendant was the sole and primary cause of Goodwin's injuries. If, however, it can be said that Goodwin's injuries were the result of the concurring negligence of the two companies, then, we insist that the plaintiff, and not the defendant, was the primary and principal delinquent. It had absolute control of the car; it had knowledge, actual or constructive, of its condition; it was bound as a matte rof law to exercise reasonable care for Goodwin's safety. Nowithstanding, it sent him to the danger which resulted in his injuries.

On the other hand the car was owned by the Hammond Packing, company and used by that company for transporting its products to various points in the country. It was handled by the defendant as a common carrier, and was entirely beyond its control after it had been delivered to the plaintiff. The negligence imputed to the plaintiff consists in a mere omission to discover and repair the brake while the

car was in its possession. If this omission had any legal connection whatever with Goodwin's injury, it was certainly quite as passive and remote as it could well be. Certainly as passive and remote as the plaintiff's *act in negligently using the car while in a dangerous condition.*

In his brief counsel illustrates his contention by *Gray v. Boston Gas Light Company*, 114 Mass, 149; and *Lowell v. B. & L. R. Co.*, 23 Pickering 24.

In the Gray case the Boston Gas Light company attached a wire to the chimney of the plaintiff's building without his knowledge or consent so as to render the chimney unsafe and ultimately to cause it to fall upon a passer-by and to seriously injure him. The party injured sued the owner of the building, whereupon he notified the gas company that he should look to it for indemnity and requested it to defend the case. The gas company declined to defend or to advise as to a settlement. The owner settled the case and brought suit against the gas company for the amount he had been compelled to pay. The court was of the opinion that the gas company was responsible to the owner of the building inasmuch as the jury had found that the wrongful act of the gas company had caused the unsafe condition of the building and exposed the plaintiff to liability without actual fault on his part.

In the Lowell case the defendant railroad company, with the permission of the city, graded its line across a street and neglected to put up barriers for the protection of the public. The plaintiff fell into the excavation and was injured. The city was thereupon compelled to respond in damages, and it in turn re-

covered the amount of the damages from the railroad company.

In these cases the ultimate liability was fixed upon the party primarily responsible for the injuries. The owner of the building in the one case and the city in the other were guilty of no actual negligence; still each was bound to exercise proper care for the safety of the public using the streets. The gas company in attaching the wire to the chimney weakened it, and ultimately pulled it down upon a passer-by, and the railroad company in building its line across the street left the excavation unguarded, and a person fell into it and was injured. Each of these companies, the railroad company and the gas company was legally bound to guard the public against the danger *created by its own acts*, and the owner of the building in the one case and the city in the other, were equally bound to see that the public was guarded from the dangers thus created.

If the principle announced in these cases is to be applied in the present controversy, we submit that the plaintiff and not the defendant is the primary and principal transgressor, for the negligence of the plaintiff consisted in using or permitting its employes to use a defective and dangerous car with actual or constructive knowledge of its condition. It was bound, as every railway company is, to know the actual condition of all cars used upon its lines, where such condition may be known by the exercise of reasonable care The situation of plaintiff in this case is the same as if it had actual knowledge of the defective brake which caused Goodwin's inqries.

We submit that in no view of the facts stated in

plaintiff's petition should the defendant be held liable for the damages complained of.

Respectfully submitted,

CHARLES J. GREENE,

Attorney for Defendant.

Omaha, Nov. 15, 1904.